

CALIFORNIA ENERGY COMMISSION

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SACRAMENTO, CA 95814-5512



March 21, 2001

Siting Constraints Oil (00-SIT-2)
Interested Parties
Mailing List 773

Please find enclosed a copy of staff's revised white paper discussing the timing of Federal permits. The attached staff paper was revised to better reflect our working relationship with Federal agencies, and to assist parties in their preparation for the workshop scheduled for March 27, 2001, on this subject. The attached staff paper should replace the earlier draft paper sent to you on March 15, 2001.

Thank you for your cooperation, and if you have any comments, questions or suggestions, please call me at (916) 653-1614 or email me at rbuell@energy.state.ca.us.

Sincerely,

Richard K. Buell
Project Manager

RKB:rkb

TIMING OF FEDERAL PERMITS CONSTRAINTS

INTRODUCTION

There is no requirement that Federal agencies issue their permits prior to or concurrent with the California Energy Commission's (Energy Commission) powerplant decisions. However, the Warren Alquist Act prohibits the Energy Commission from making "any finding in conflict with applicable federal law or regulation." (PRC §25525) Consequently, the Energy Commission cannot approve a project that does not meet Federal requirements.¹ Therefore, Federal agency participation in the Energy Commission siting process provides the best possible assurance that the Energy Commission's actions are consistent with Federal requirements.

Because of California's critical need to license new powerplants expeditiously, the timing of Federal permits is also critical. For the most part, Federal agencies have been responsive to the state's needs for timely review of powerplants, transmission lines or gas pipelines. The Federal agencies and Energy Commission staff have developed a cooperative working relationship that has facilitated the licensing of new powerplants. The purpose of this paper and the workshop scheduled for March 27, 2001 is to discuss those strategies that have worked the best in the past to expedite review, and to discuss new or innovative approaches, where needed, to meet the state's changing need for licensing of new powerplants and related facilities.

This paper discusses to what extent and how the issuance of Federal permits has been coordinated with the Energy Commission staff in licensing of new powerplants in California over the past several years. The information presented is based on the Energy Commission's experience with the 12-month siting process. Expedited and emergency siting processes (either six-month, four-month simple cycle projects, or emergency siting projects) that are now being implemented present new challenges to assure timely and coordinated federal and state review of new energy facilities in California. Staff is continuing to work with appropriate federal agencies to meet this challenge by examining innovative ways to expedite Federal and state approval of needed powerplants.

PROBLEM STATEMENT

It is important to stress that the relationship between Federal and state permitting of energy facilities is *not broken*. The objective is to find ways to address problems that have been encountered, and examine opportunities to streamline the permitting process to expedite licensing of energy facilities. As experienced in several recent cases, the timing of some Federal permits (and their requirements for the siting, construction, and

¹ For example, the Energy Commission cannot approve a project that is to emit 2.5 parts per million (ppm) for nitrogen oxides (NOx) averaged over three-hours, if the U.S. Environmental Protection Agency (USEPA) is likely to determine that best available control technology (BACT) under Prevention of Significant Deterioration (PSD) regulations is 2.0 ppm averaged over one-hour. The Energy Commission could require mitigation that is more restrictive than required by Federal regulations.

operation of powerplants) may impact and possibly constrain the licensing process in a variety of ways, including the following:

- Lack of sufficient information needed to evaluate the project's compliance with Laws, Ordinances, Regulations, and Standards (LORS) has made it difficult to develop timely Federal agency positions.
- Lack of a complete mitigation plan has made it difficult to evaluate the mitigation measures that are needed to meet federal requirements.
- The applicant has modified its proposed design of the powerplant or related facilities, which has required the Federal agency and Energy Commission to restart their review of the project.
- Delaying important Federal permit decisions until after the Energy Commission's decision has made it difficult for the Energy Commission to determine what mitigation measure will be required.
- Federal permits are subject to further appeals processes over which the Energy Commission may have limited influence.

The potential issues associated with coordinating the timing of Federal permits have been dealt with in a number of different ways. Federal agencies and staff have worked together to ensure that the needed information is developed and presented during the Energy Commission's licensing process. Federal agencies and staff have worked together to ensure that the mitigation measures proposed by staff are consistent with the measures that are likely to be required by the Federal Agencies. Federal agencies have also helped to identify and address critical issues through written comments, and participation in workshops and hearings. This has helped to ensure that the mitigation measures proposed by staff will likely be consistent with requirements to be contained in Federal permits. The following sections describe some areas where additional efforts may be needed to assure that issues are resolved in a timely manner.

RELATIONSHIP TO THE POWERPLANT LICENSING PROCESS

Table 1 (at the end of the text of this paper) provides a listing of the federal permits that are potentially applicable to the approval for construction and operation of a powerplant. These permits are identified in Table 1 by the topics addressed, along with the administering agencies and the potential for the permits to act as constraints on the licensing process.

Some of these permits are granted directly by a Federal agency. For example, the Biological Opinion (BO) required under Section 7 or a "Take Permit" required under Section 10 of the Endangered Species Act (ESA) of 1973 are issued by Federal agencies. Some permits are granted by a state or local agency, but are subject to review by Federal agencies or subject to appeal to Federal Agencies. For example, some Prevention of Significant Deterioration (PSD) permits under the Clean Air Act that are issued by delegated local air pollution control districts can be reviewed by the USEPA and the USEPA's Environmental Appeals Board (EAB). In other cases; permits are granted by state or local agencies under Federally-delegated programmatic

authorities without required Federal agency review (e.g., air permits granted under the State Implementation Plan).

As indicated in Table 1, there are only a few key Federal permit processes that, if delayed, could cause significant delays and add substantial uncertainties to the Energy Commission's powerplant licensing process; these are addressed below:

- **Permit processes under the Endangered Species Act**

The Endangered Species Act (ESA) is administered by the U.S. Fish and Wildlife Service (FWS) and the National Marine Fisheries Service (NMFS), either under the consultation requirements of Section 7 of the Act or under Section 10. Section 7 applies where another Federal agency is involved in taking an action on a project. Section 10 provides for Take permits under certain circumstances where a listed species may be adversely affected. Section 7 typically requires that a Federal agency whose action is likely to affect a listed species submit a Biological Assessment (BA) to the FWS for Formal Consultation and a Biological Opinion. The FWS, upon accepting the BA (it may ask for more information before accepting), generally tries to provide the Biological Opinion (BO) within 135 days. A Section 10 Take permit, for projects that don't involve an action by another Federal agency, generally requires the development of or contribution to a Habitat Conservation Plan (HCP) for the affected species, with approval from the FWS, a process that may take substantial time and effort.

- **Prevention of Significant Deterioration (PSD) Permits under the Clean Air Act**

This permit program is administered by the U.S. Environmental Protection Agency (USEPA) or delegated to local air districts. In either case, these permits are appealable to the USEPA's Environmental Appeals Board (EAB). One reason that there have been delays in issuing PSD permits is that the USEPA or its delegate air district may not issue the PSD permit until after a BO, if needed, has been issued by the FWS. The FWS has not always had sufficient staff resources to provide timely review of projects, particularly when information necessary to analyze the project is lacking or the applicant has changed the project.

The USEPA has provided timely comments on the local air district's proposed Determination of Compliance (DOC) and on the Energy Commission staff's proposed mitigation measures. This has ensured that the conditions required by the Energy Commission will be consistent with the PSD permit conditions. Nevertheless, PSD permits may be appealed to the EAB within 30 days. If such an appeal petition is filed, the applicant may be required to delay the start of construction until the petition is resolved. The EAB has broadly interpreted the scope of the issues that it may review. Issues considered by EAB include compliance with Executive Order 12898 regarding environmental justice, as well as the analysis of alternative sites. As a result, such EAB reviews can often require six months to a year to resolve, with no mandatory upper limit. These issues demonstrate the need for the Energy Commission to ensure that issues of potential interest to Federal agencies are adequately addressed during its powerplant licensing process. They also demonstrate the need to provide adequate staff

resources to allow for timely Federal agency reviews of energy projects in California.

- **National Pollutant Discharge Elimination System (NPDES)**

This permitting program has caused uncertainties in the licensing process due to changing USEPA regulations and regulatory guidance. With the new California Toxics Rule and the promulgation of new USEPA regulations governing discharges from construction sites, the regulatory requirements of the California Regional Water Quality Control Boards as they pertain to individual projects are in a state of flux. This may delay the completion of applicable permits, and potentially result in overall project delays as well as uncertainties in the AFC process with respect to LORS compliance and project mitigation.

- **Federal Land Use Entitlements**

Federal land management agencies, such as the U.S. Bureau of Land Management (BLM) or the Forest Service (USFS), have lengthy and involved review processes governing such actions as the grant of rights-of-way (ROWs) and special-use permits for pipelines and transmission lines, as well as special-use permits or land exchanges for other facilities. These processes typically require the preparation of an environmental impact statement (EIS), which is similar in scope to the Staff Assessments prepared in the AFC process, and may extend beyond the 12-month AFC process.

In addition, new interstate gas pipelines require Federal Energy Regulatory Commission (FERC) approval, which typically entails the preparation of an EIS under NEPA and participation by Federal land management agencies as Cooperating Agencies. Transmission lines may involve permits from the Western Area Power Administration (WAPA) and the California Public Utilities Commission (CPUC) and associated NEPA and CEQA compliance documents, which may be large and complex and may take more than 12 months.

- **Indian Reservations, Treaty Resources, and Native American Concerns**

For actions involving use of Indian Reservation lands, the U.S. Bureau of Indian Affairs (BIA) would be the Lead Federal Agency. Similar to the Federal land management agencies as described above, the BIA has comprehensive review processes and NEPA compliance requirements. This would involve extensive tribal consultation, as would projects that could affect resources protected by tribal treaty rights or cultural resources of significance to Native Americans, such as graves and sacred artifacts, which are protected under the Native American Graves Protection and Repatriation Act of 1990 (NAGPRA).

Although there have not been examples of delays and significant uncertainties experienced to date, the permitting issues with respect to Federal land use entitlements and FERC, WAPA, and CPUC permits may come to be more prominent in the near future as gas pipeline capacity and transmission line constraints come to be more important to the construction and operation of new powerplants.

CRITICAL ISSUES

There are a number of time-critical issues and causes of delay that have come up in past cases. These are summarized below with reference to the type of permit or situation likely to be involved.

- Delays in project definition, development of environmental information and mitigation measures, and submittal of adequate permit application materials by the project applicant - the Three Mountain and Otay Mesa cases exemplify these problems.
- Delays in initial reviews of permit application materials and associated requests for additional data and analyses by the permitting agency, such that application completeness and acceptance is further delayed. This may be followed by delays in review and decision making after completed permit applications have been submitted. These delays may be due to inadequate scheduling and schedule adherence, insufficient staff for permit processing, shifts in priority given to different projects, staff reassignments, or pressures from other stakeholders to change priorities, delay decisions, or deny approvals. FWS staff resource issues in reviewing BAs and generating BOs were clearly most important in the San Joaquin Valley cases.
- Recent or on-going changes in law, regulation, or permitting procedures that result in delays in permit processing or decision making. This problem may become a key schedule issue for the Contra Costa NPDES permit.
- Appeals procedures may subject a project to schedule and approval uncertainties. The USEPA Environmental Appeals Board (EAB) regulations and procedures appear to leave the door open to appeals that may delay projects, by providing for stays of permit approvals without any demonstration of likelihood that the merits of the appeal would prevail against the approval grant. Such an appeal occurred in the Sutter case and may be anticipated in other cases where there is opposition to the project. Developing a clear record in the Energy Commission process that addresses issues that may be appealable to the EAB may avoid some of this regulatory uncertainty.
- Potential delays associated with permitting pipelines, transmission lines, and facilities on Federal lands that require the preparation of EISs under NEPA may occur. On many cases the federal NEPA process has been coordinated with the Energy Commission's CEQA requirements. Given the limited availability of both federal and state resources, such coordination must be pursued if potential delays in licensing new powerplants are to be avoided.

Table 1 Federal Permits Potentially Involved in the Licensing and Implementation of Powerplant Projects in California

Topic/Potentially Applicable Permits	Administering Agencies	Potential for Acting as Constraint
Engineering Geology/None	N.A.	N.A.
Civil and Structural Engineering/None	N.A.	N.A.
Mechanical Engineering/None	N.A.	N.A.
Electrical Engineering/None	N.A.	N.A.
Powerplant Reliability/None	N.A.	N.A.
Public Health/Worker Safety Clean Air Act permits (see Air Quality)	N.A.	(Note that there are applicable regulations of the Federal OSHA, but no related worker safety permits <i>per se</i>)
Transmission Systems Safety and Nuisance/None	N.A.	(Note that there are applicable regulations of the Federal Communications Commission and the Federal Aviation Administration, but no related permits <i>per se</i>)
Air Quality Prevention of Significant Deterioration (PSD) Note that there are a variety of other permits (New Source Review, Risk Management Plans, Operating Permits) and regulations (New Source Performance Standards, NESHAPS, Acid Rain, etc.) under the Clean Air Act that are administered by local districts, with USEPA review	USEPA Region 9/ USEPA Environmental Appeals Board (EAB)	Region 9 administers PSD permits for areas where jurisdiction has not been delegated to local district; all PSD permits are appealable to EAB, appeals process can be lengthy USEPA reviews may delay finalization of other permit decisions due to length or complexity of such review documents, but except for PSD permits the other permits are not appealable to the EAB; delays in regulatory program implementation by local districts or changes in Federal regulatory requirements can delay permit processing by local districts
Geological Hazards and Resources/None	N.A.	N.A.
Agriculture and Soils Permits under Federal water regulations (see Water Resources)	N.A.	N.A.
Water Resources NPDES permit for operating discharges (point, incl. Storm) • NPDES permit for construction Storm water discharges Clean Water Act Section 404 (dredge and fill) permit Rivers and Harbors Act Section 9 and 10 permits National Flood Insurance/Floodplain regulations (no permits involved)	Regional Water Quality Control Boards (California State Agencies)/review by USEPA Region 9 US Army Corps of Engineers, with review by USEPA US Coast Guard or Army Corps of Engineers N.A.	USEPA reviews may delay finalization of other permit decisions due to length or complexity of such review documents; delays in regulatory program implementation by regional boards or changes in Federal regulatory requirements can delay permit processing by regional boards. Clean Water Act requirements for a Spill Prevention, Control, and Countermeasures (SPCC) Plan must be complied with for operation, but this is not a permit requirement <i>per se</i> . Introduces the Federal NEPA process, which can be conducted in parallel or after the AFC process (with significant delay potential if after); this process also can require Section 7 consultation with the USFWS as well as increased review of cultural resource issues under the NHPA and other laws (see Biological and Cultural Resources) Provide for prevention of adverse effects on navigation – should never act as constraint unless ignored N.A.

Topic/Potentially Applicable Permits	Administering Agencies	Potential for Acting as Constraint
<p>Biological Resources</p> <p>ESA Section 10 take permit (where no Federal agency action involved)</p> <p>ESA Section 7 Biological Opinion (where Federal agency action is involved)</p>	<p>US Fish and Wildlife Service (FWS), National Marine Fisheries Service (NMFS)</p> <p>USFWS, NMFS</p>	<p>Usually requires impact analysis, mitigation measures, and development of or contribution to Habitat Conservation Plan</p> <p>Requires Biological Evaluation or Biological Assessment by the Lead Federal Agency for the Federal action (including impacts analysis, alternatives analysis, mitigation, and possibly some equivalent or contribution to a Habitat Conservation Plan)</p>
<p>Cultural and Paleontological Resources</p> <p>Review under National Historic Preservation Act (Section 106) for Federal agency actions</p> <p>Permit for excavation on Federal lands</p> <ul style="list-style-type: none"> Native American consultation 	<p>Advisory Council on Historic Preservation, State Historic Preservation Officer</p>	<p>Can require lengthy literature reviews, field studies, coordination with tribes, monitoring, mitigation, and data recovery where resources on National Register or eligible for the National Register or cultural resources of significance to Native Americans, such as graves and sacred artifacts, could be adversely affected</p>
<p>Land Use</p> <p>Coastal Zone Management Act Consistency Determination</p> <p>Federal Lands (e.g., administered by Bureau of Land Management or Forest Service): leases, rights-of-way, special-use permits, land exchanges for facility sites, transmission lines, or pipelines)</p> <p>Indian Reservations: leases, rights-of-way, special-use permits, land exchanges for facility sites, transmission lines, or pipelines)</p>	<p>Local Coastal Planning agency/appealable to Coastal Commission</p> <p>The Federal land management agency; BLM if multiple land management agencies involved; FERC for interstate pipelines; DOE for international pipelines; WAPA for some transmission lines</p> <p>Bureau of Indian Affairs (BIA)</p>	<p>Could require lengthy analyses, reviews, public meetings, etc. if project is not consistent with existing or already planned uses</p> <p>Require lengthy analyses, including NEPA documents (and Finding of No Significant Impact or Record of Decision), typically involving multiple agency and, sometimes, Native American consultations (e.g., with USFWS under Section 7 of ESA, and with cultural resource agencies and Indian tribes) and public involvement</p> <p>Require lengthy analyses, including NEPA documents (and Finding of No Significant Impact or Record of Decision), typically involving Native American and multiple agency consultations (e.g., with USFWS under Section 7 of ESA, and with tribal and cultural resource agencies) and public involvement</p>
<p>Socioeconomics</p> <p>Environmental Justice analysis under Executive Order 12898 (in conjunction with other Federal action)</p>	<p>USEPA review of NEPA document or in EAB (e.g., in review of PSD permit)</p>	<p>Can require lengthy analysis and documentation, public involvement with potentially sensitive issues</p>
Traffic and Transportation/None	N.A.	(Note that there are applicable regulations of the Federal Department of Transportation, but no related permits <i>per se</i>)
Noise/None	N.A.	(Note that there are applicable regulations of the Federal OSHA, but no related worker safety permits <i>per se</i>)
Visual Resources/None	N.A.	Can be a major issue of concern on Federal lands, where NEPA is applicable to a Federal action
<p>Hazardous Materials/Waste Management</p> <p>Storage facilities permits (under RCRA, if applicable)</p> <p>Note that other permits mandated under SARA (e.g., Business Plans) and RCRA (e.g., Underground Storage Tank permits) are administered under local agency programs.</p>	<p>Administered by DTSC/review by USEPA Region 9/ USEPA Environmental Appeals Board (EAB)</p>	<p>USEPA reviews may delay finalization of other permit decisions due to length or complexity of such review documents; EAB appeals process can be lengthy</p>